Supreme Court, U.S.
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No. 98-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES F. GRESHAM,

Petitioner,

—v.—

WILLIAM HENDERSON, Postmaster General,
United States Postal Service,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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61 pp

QUESTIONS PRESENTED

1. May a federal agency refuse to treat a person with epilepsy as disabled within the meaning of Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791 ("Section 501"), during the hiring process because of mitigating measures such as medication, and thereby avoid its affirmative duties to reasonably accommodate a disabled applicant for employment?

2. Does the circuit court's refusal to decide on appeal the merits of petitioner's claim that the federal agency failed to perform its affirmative duty to accommodate violate the Due Process Clause of the Fifth Amendment to the United States Constitution?

3. Must a federal government employer, pursuant to Section 501 of the Rehabilitation Act, consider as a reasonable accommodation during the employment application process the current mitigated state of a known disabling condition, which previously manifested itself in a record of poor job performance in the unmitigated state and led to dismissal for cause?

4. Was the jury instruction, "Qualified Individual With A Disability" patently plainly erroneous and prejudicial under Section 501 of the Rehabilitation Act because it delegated to the jury the legal question of whether the United States Postal Service satisfied its affirmative duties of reasonably accommodating a qualified handicapped individual during the hiring process?

PARTIES TO THE PROCEEDING

All of the parties are listed in the caption. William Henderson, Postmaster General, United States Postal Service, was substituted as Respondent pursuant to Sup. Ct. R. 35(3).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles F. Gresham respectfully prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on December 14, 1998.

OPINIONS BELOW

The opinion of the Tenth Circuit, which is not reported, is set out at pp. 3a-6a of the Appendix hereto. The March 10, 1999, decision of the court of appeals denying rehearing and rehearing en banc, which is also not reported, is set out at pp. 1a-2a of the Appendix.

JURISDICTION

The decision of the Tenth Circuit was entered on December 14, 1998. A timely petition for rehearing was denied on March 10, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This matter involves the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." It also involves Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791(b), and relevant implementing regulations.

Part 29 C.F.R. § 1614.203(d)(1), provides in pertinent part:

> (d) *Employment Criteria.* (1) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with handicaps or any class of individuals with handicaps unless:
>
> (i) The agency demonstrates that the test score or other selection criterion is job related for the position in question and consistent with business necessity; and
>
> (ii) OPM or other examining authorities shows that job-related alternative tests, or the agency shows that job related alternative criteria, that do not screen out or tend to screen out as many individuals with handicaps are unavailable.

29 U.S.C. § 791(b) is reproduced at p. 7a of the Appendix. 29 C.F.R. § 1614.203(d)(1) is reproduced at p. 11a of the Appendix. Other regulations involved, but not set forth ver-

batim, above, are reproduced in the Appendix as follows: Appendix D - 29 C.F.R. § 1613.701 (App. p. 8a); Appendix E - 29 C.F.R. § 1613.702 (App. pp. 8a-9a); Appendix F - 29 C.F.R. § 1613.703 (App. p. 10a); Appendix G - 29 C.F.R. § 1613.704 (App. p. 10a); Appendix H - 29 C.F.R. § 1614.203(d)(1) (App. p. 11a); and, Appendix I - 29 C.F.R. § 1630.2(o)(i) (App. p. 12a).

STATEMENT OF THE CASE

Petitioner, Charles F. Gresham ("Gresham"), although a person diagnosed with epilepsy, was employed by the United States Postal Service ("Postal Service" or "respondent") from 1966 until 1986. In July, 1986, Gresham was discharged on account of behavior he states was caused by his epilepsy. (App. p. 4a). The Postal Service's own physician, Dr. Hill, had also determined by October, 1985, that epilepsy-induced psychomotor seizures Gresham had suffered at work were what had caused him to "forsake his duties." (App. p. 25a, ¶3). Prior to his discharge Gresham had sought medical retirement. After his discharge petitioner was granted medical retirement from the Postal Service. The Office of Personnel Management's ("OPM") retirement decision (App. pp. 21a-24a) stated that petitioner's "date of incapacitation" was in May, 1986, *prior to his discharge*. (App. __p. 24a, § "5").

After his medical retirement petitioner remained severely disabled on account of his epilepsy, but in 1991 was treated with a new medication, Tegretol, which completely controlled his seizures. (App. pp. 4a & 28a). After experiencing over a year of successful control of his seizures, petitioner in 1993 applied to be rehired by the Postal Service, and specifically requested that the application process consider not only his new condition but that his past behavior was caused by his epilepsy.

The Postal Service, while considering Gresham's application for re-employment, reviewed a portion of petitioner's

work history, but not his Postal Service medical records.[1] (App. p. 4a). The Postal Service presented no testimony at trial on its case in chief. However, Ms. Linda Littleton, whom respondent stipulated made the decision not to rehire Gresham and whom Gresham called as a witness for his case in chief, testified that she did not consider Gresham to be "disabled" because his new drug therapy controlled his epilepsy. Ms. Littleton performed what she termed a "personal suitability decision" process, employing the respondent's internal agency policy that a prior record of discharge for cause would negate rehiring a former employee. (Policy attached at App. p. 13a.) Ms. Littleton stated that this "zero tolerance" policy negated any rehire where there was prior removal denominated "for cause," and this policy was applicable even to a request for accommodation for a disability in the employment application process. Ms. Littleton did not get to a consideration of Gresham's request for accommodation in the employment application process (i.e., Gresham's request for consideration that his prior work conduct was epilepsy-induced and/or scheduling a medical examination to evaluate his current condition), because respondent's agency policy regarding removal for cause rendered petitioner unfit at the outset.

Petitioner maintained in his complaint, pretrial order, at all stages of the trial proceeding including trial testimony, in his motion for directed verdict at close of evidence, and in his post trial motions for new trial and judgment n.o.v, that the

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[1] These medical records included those of both Gresham's then-treating physician, Dr. Prosser, who periodically advised the Postal Service circa 1982-1986 of Gresham's worsening epilepsy, that it was the cause of his aberrant behavior at work, and recommending medical retirement, *and* several examinations performed between 1982-1985 by the Postal Service's physician. The final "fitness for duty" examination performed by the Postal Service's physician, Dr. Hill, not only chronicled Gresham's past condition of epilepsy, but concluded that it had progressed by October, 1985, to the point where Gresham had psychomotor seizures *at work* leading him "to forsake his duties." (App. p. 25a at § 3).

Postal Service as a federal government agency had an affirmative duty to reasonably accommodate him, including accommodation in the application process: specifically, to consider that such past conduct was epilepsy-induced and to presently determine by medical evaluation that such past conduct was not likely to recur on account of his improved medication that controlled his seizures. (*See, e.g.*, App. pp. 5a, 15a-17a & 20a, ¶3.) It was undisputed below that the Postal Service refused to undertake such a present evaluation of Gresham's fitness for postal service, because of the reasons articulated by Ms. Littleton.

Importantly, the *only* testimony at trial of petitioner's current medical condition with his epilepsy controlled and of his attendant fitness for postal service at the time of his 1993 application for re-employment is that Gresham could in fact safely perform all functions of the job. This testimony came from Mr. Gresham, from a Postal Service worker currently holding that same job and who had knowledge of Gresham's current physical state under his new drug treatment, and from Gresham's current treating neurologist, Dr. King, who had earlier tendered a written report stating that because of the new medication Gresham, although still an epileptic could currently perform any job except that of a commercial airline pilot. (App. pp. 27a-28a). The Postal Service offered no evidence to counter this cumulative testimony that petitioner could in fact safely perform all necessary job functions of the position for which he applied.

Petitioner maintained his right to an individualized consideration of his employment application stemming from the Act and its implementing considerations. (App. p. 4a) Petitioner also argued that the Postal Service had supplanted federal statute with its own internal policy[2] by allowing its

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[2] In denying the Postal Service's motion for a directed verdict at the close of plaintiff's evidence, the trial judge held that a Postal Service policy or agency rule could not "trump" the requirements of the Act.

internal policy to "trump" the agency's affirmative duty(s) under Section 501 of the Act to reasonably accommodate a disabled job applicant. At close of all evidence, petitioner made a motion for directed verdict based upon the respondent's admitted refusal to accommodate Gresham in any manner (because of petitioner's "disqualification" under the respondent's personal suitability process). Relevant portions of this trial motion are included in the Appendix at pp. 15a-18a to illustrate that the issue of the respondent's failure to perform its affirmative duty to accommodate was in reality raised at trial.

The issues were submitted to a jury, which returned a general verdict in favor of the Postal Service. After jury verdict petitioner timely filed a Fed.R.Civ.P. Rule 50 Motion for Judgment N.O.V. and a Rule 59 Motion for new trial. That motion(s) is, also, attached as Appendix pp. 19a-20a. As numbered paragraph "3" of the post-trial motion(s) clearly shows, the issue of the Postal Service's failure to perform its Section 501 affirmative duty to reasonably accommodate was *again* raised before the trial court.

On appeal the Tenth Circuit affirmed the United States District Court for the Western District of Oklahoma, holding that the objected jury instruction was a correct statement of the law and holding that the issue of the Postal Service's failure to reasonably accommodate had not been raised below. (App. pp. 3a-6a). Petitioner timely sought rehearing referencing pleadings (both his Complaint and the Postal Service's Answer), testimony at trial, and the post-evidentiary motion for directed verdict and the Rule 50 & Rule 59 Motion for Judgment N.O.V. and Motion for New Trial, the latter of which are attached hereto as Appendices L & M to illustrate the issue had been extensively raised below. The Tenth Circuit declined rehearing. (App. pp. 1a-2a).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET DECIDED BY THIS COURT: THAT MITIGATING MEASURES SUCH AS MEDICATION SHOULD NOT BE CONSIDERED IN DETERMINING WHETHER A PERSON IS "HANDICAPPED" UNDER THE REHABILITATION ACT OF 1973, AND THE FACT THAT A DISABILITY IS IN A STATE OF MITIGATION BECAUSE OF MEDICATIONS DOES NOT OBVIATE A FEDERAL AGENCY'S HEIGHTENED AFFIRMATIVE DUTY TO REASONABLY ACCOMMODATE UNDER SECTION 501 OF THE ACT.

The Postal Service's rationale for denying petitioner's application for re-employment turned upon two factors: (1) Ms. Littleton did not consider Gresham to be a "disabled"[3] person when he sought reemployment in 1993, because his epilepsy was then under control by his new medication; and (2) Gresham's prior poor work record in and before 1986 culminating in his removal "for cause" precluded any accommodation during the 1993 application/re-employment process—even the consideration that his prior work record was not volitional, but was caused by psychomotor seizures at work. The respondent agency would not even consult or consider the historic records of its own physician, Dr. Hill, who had as early as October 18, 1985 definitively concluded that Gresham's poor work performance was induced by epileptic psychomotor seizures petitioner was suffering while on the job. (App. pp. 25a-26a).

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[3] The term *disabled*, as is used in the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, will normally be used rather than the Rehabilitation Act's "handicap."

Had the Postal Service conceded Gresham was in fact disabled at the time of his 1993 application for re-employment, it would have become problematic for the agency to reconcile its pre-selection suitability process with its affirmative duty to extend reasonable accommodations in the application process of a type as are recognized as appropriate in furtherance of the Act's policies. *See,* 29 C.F.R. § 1630.2(o)(i). (App. p. 12a; ADA implementing regulation).

Under 29 U.S.C. § 706(7)(B)[4], a "handicapped (disabled) individual" includes one who "has a physical or mental impairment which substantially limits one or more of such person's major life activities," or "has a record of such impairment." *Accord,* 29 C.F.R. § 1613.702(a). (App. p. 8a). Both the medical opinions of Dr. Hill (App. pp. 25a-26a) and later of Dr. King (App. pp. 27a-28a), as well as the decision of the Office of Personnel Management (App. pp. 21a-24a) establish that Gresham at all relevant times suffered from epilepsy/ organic brain syndrome. Such an illness is specifically described as fulfilling the requisite impairment by implementing regulation, 29 C.F.R. § 1613.702(b):

> (b) *Physical or mental impairment* means (1) any physiological disorder or condition . . . affecting one or more of the following body systems: Neurological; . . . or (2) any mental or psychological disorder such as . . . *organic brain syndrome* . . . . (Emphasis added.)

If a neurological condition and/or organic brain syndrome affects a person's work, as Gresham's epilepsy clearly did from an examination of Dr. Hill's 1985 fitness for duty medical report (App. p. 25a, § 3) or form an examination of the Office of Personnel Management's 1986 decision summary (App. pp. 21a-24a), then such an impairment is one which affects a "major life activity," pursuant to 29 C.F.R. § 1613.702(c):

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[4] Title 29 U.S.C. § 791 is contained within Subchapter V of Ch. 16 (Rehabilitation Services) and, therefore, subparagraph 706(7)(B), rather than subparagraph 706(7)(A), is controlling.

> (c) *Major life activities* means functions, such as . . . working.

Not only did Gresham unquestionably have a disabling illness, but because of the extensive Postal Service work record imbued with notations of his epilepsy, medications, seizures, and aberrant behavior stemming from seizures, Petitioner also had a "record of such disability" under 29 C.F.R. § 1613.702(d), which makes a "record of impairment" a disabling factor:

> (d) *Has a record of such an impairment* means has a history of, or has been classified . . . as having a mental or physical impairment that substantially limits one or more major life activities.

Respondent's Dr. Hill determined that petitioner's epilepsy/ organic brain syndrome had caused his work deficiencies by and before October, 1985, which thereafter precluded Gresham from customer contact, working around machinery, driving, etc. (App. p. 26a at § 5.) OPM determined that by May, 1986, Gresham was "incapacitated" and there was no reasonable accommodation to allow continuation of employment. (App. p. 24a, §§ 5, 6 & 7). Hence, by May, 1986, petitioner had not only a medically diagnosed condition of disability, but a record of same which had affected his job performance. It was this record, including petitioner's aberrant behavior exhibited during his historic psychomotor seizures at work, which caused Ms. Littleton to decide in 1993 to end the application at the "personal suitability" stage and not to proceed to even a determination if a reasonable accommodation could be made; i.e., to consider, as Dr. Hill clearly stated in 1985, that Gresham's historic work performance was caused by seizures . . . but which were not likely to recur given the mitigation of the illness by the new medication as reported in Dr. King's medical statement furnished to respondent with petitioner's 1993 application. (App. pp. 27a-28a).

When presented with both a history of disability and a present disability, there is nothing in the implementing regulations suggesting that a federal agency, without more, can elect to treat a person as not disabled because of the mitigating factor of medications. In fact, the definition of disability/handicap was extended by amendment in 1974 precisely to defeat such "avoidance" tactic. Senator Alan Cranston explained that the purpose of the extended definition in 29 U.S.C. § 706(7)(B) to include discrimination based upon consideration of a "record of disability," was to cover:

> ". . . persons who have recovered—in whole or in part—from a handicapping condition *such as mental or neurological illness*, but who may nevertheless be discriminated against on the basis of prior medical history . . .." (Emphasis added.) AMERICANS WITH DISABILITIES ACT, § 3.03 (Ogletree, Deakins, et al.; Matthew Bender 1997).

What Ms. Littleton did by avoiding the Rehabilitation Act's duties to accommodate upon the basis that she did not consider petitioner to be disabled, since medication now controlled his epilepsy, was not discernably different than what private employers, United Air Lines, Inc., and United Parcel Service, Inc., did with respect to their duties to accommodate under the ADA. The legal arguments raised by both petitioners and amicus curiae, Equal Employment Opportunities Commission, in *Karen Sutton and Kimberly Hinton v. United Airlines, Inc.*, No. 97-1493, and *Vaughn L. Murphy v United Parcel Service, Inc.*, No. 97-1992[5] are applicable and compelling to Mr. Gresham's Petition, but will not be here repeated in detail.

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[5] These cases both arose out of the Tenth Circuit and dealt, *inter alia*, with private employers' obligations under the Americans With Disabilities Act to accommodate employees who had disabling conditions, but which conditions were mitigated by medications, corrective lenses, or other prosthetic devices.

An even more compelling reason why mitigating factors cannot be used by a federal agency employer to avoid duties of accommodation, is the federal employer's heightened duties under Section 501 of the Rehabilitation Act. *Woodman v. Runyon,* 132 F.3d 1330, 1338-1346 (10th Cir. 1997). But in petitioner's case the Postal Service did not follow the process delineated in cases such as *Buckingham v. United States,* 998 F.2d 735, 740 (9th Cir. 1993) (cited with approval in *Woodman v. Runyon, supra*) or *Crane v. Lewis,* 551 F.Supp. 27 (D.D.C. 1982), which procedures require the federal agency to meet its duty by first gathering sufficient information from the applicant and experts in order to determine if reasonable accommodations are available commensurate with the safety of the applicant and co-workers, rather than employing only a subjective determination of possible, potential harm from employment of the disabled person. A federal agency employer, according to the law of the Ninth Circuit, must make such bona fide inquiry before refusing to affirmatively accommodate.

The Tenth Circuit avoided deciding the merits of petitioner's appellate claim that the respondent failed to perform its Section 501 mandated, affirmative duties, by holding the issue was not raised below. *See,* Proposition II, *infra.* The Tenth Circuit thus sanctioned the respondent's avoidance of its affirmative duties by allowing the Postal Service to: (1) consider petitioner as not disabled because of the mitigating effect of his new medication, and/or (2) by allowing use of a prior record of disability to preempt or avoid the reasonable accommodation in the hiring process of the consideration that Gresham's disability-induced behavior(s) of the mid-1980's would *not* recur because of the seizure control afforded by his new medications.

To allow the Postal Service to avoid its affirmative duties in such premises, places the Tenth Circuit in conflict with other Circuits to include the Ninth Circuit, *Buckingham v. United States, supra,* and *Manotele v. Bolger,* 767 F.2d 1416

(9th Cir. 1985), and is a consideration to grant the petition under Sup. Ct. R. 10(a). The employment criteria and hiring procedure employed in petitioner's case also conflict with the accommodation requirements of Section 501, as set forth in this Courts decision in *Southeastern Community College v. Davis,* 442 U.S. 397, 410 (1979), warranting certiorari under Sup. Ct. R. 10(c).

But the precise issue petitioner's case presents: may a federal agency employer wholly avoid its Section 501 heightened, affirmative duties (duties which are *not* obligatory for private employers under Section 504 of the Act or under the ADA) because of the presence of mitigating factors such as medications, has not heretofore been decided by this Court and certiorari is thereby warranted, also, under Sup. Ct. R. 10(c).

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IN DECLINING TO ADDRESS CLAIMS THAT RESPONDENT FAILED TO MEET ITS SECTION 501 AFFIRMATIVE DUTY, SO DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

In its order affirming the judgment of the trial court, the Tenth Circuit dealt with petitioner's claim that the respondent failed to meet its Section 501 affirmative duties, by holding at page 5 of its Order and Judgment:

> Finally, we decline to address plaintiff's claims that the Postal Service failed to meet its affirmative burdens because the issue was raised for the first time on appeal. *See Walker v. Mather (In re Walker),* 959 F.2d 894, 896 (10th Cir. 1992) (appellate court will not consider on appeal that was not raised in district court).

(App. p. 6a).

Petitioner timely filed a Petition for Rehearing, advising the Tenth Circuit that it had misconstrued the record in holding the issue was raised for the first time on appeal, and further advising that the issue had been repeatedly raised below at the pleading stage by both the petitioner's Complaint and respondent's Answer; that it had also been raised at the evidentiary stage of the trial with specific reference to the trial testimony of petitioner where he described his requests to the Postal Service for consideration that his prior work record was caused by his epilepsy; that it had also been raised at the close of evidence by a motion for directed verdict (the pertinent portions of the trial transcript are reproduced on p. 15a-18a of the Appendix) which motion contained clear argument that respondent failed to meet its Section 501 affirmative duty, and that it had finally been raised below in petitioner's Fed.R.Civ.P. Rule 50(b) and Rule 59 post trial motion for judgment n.o.v. and motion for a new trial (attached as Appendix M) which motion clearly states at numbered paragraph 3:

> (3) The jury's verdict could in any event not obviate *the defendant agency's affirmative duty to extend a reasonable accommodation in the application process* to a disabled person who had adduced evidence, unrebutted at trial, that the medical condition which had caused his prior work record was now under complete medical control; and the *Court should in its equitable power and in aid of the legal requirement for an individualized remedy*, based upon the evidence that the plaintiff is and was at trial an otherwise qualified, disabled person, *enter judgment against the defendant based upon its failure to extend a reasonable accommodation, and further order that defendant extend a reasonable accommodation to plaintiff* by, first, acknowledging that the prior work record was in whole or substantial part a product of plaintiff's disability, then uncontrolled, and second, that the *defendant perform medical tests to confirm or deny*

> *Dr. King's opinion that Gresham's epilepsy and the byproducts thereof are now under medical control, allowing plaintiff to perform the essential job functions.* (Emphasis added.)

The Tenth Circuit's response to these specific citations to the trial Record where the issue had in fact been explicitly raised, was to enter its March 10, 1999 order that "Appellant's petition for rehearing is denied." (App. p. 1a).

In the case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), this Court held that the Fourteenth Amendment's Due Process Clause required at a minimum that deprivation of life, liberty or property be preceded not just by adequate notice, but by an opportunity for a hearing "appropriate to the nature of the case."

The Due Process Clause of the Fifth Amendment imposes the same requirement upon the federal courts. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430 (1982), *citing, Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958), and referencing this Court's traditional holding that "the Due Process clauses protect civil litigants who seek recourse in the courts," this Court reiterated its holding that:

> the "property" component of the Fifth Amendment's Due Process Clause . . . (imposed) "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

This Court in *Logan v. Zimmerman Brush Co., supra,* continued by reiterating its holding in *Boddie v. Connecticut,* 401 U.S. 371, 380 (1971), that the Fourteenth Amendment's Due Process Clause prevented the States from:

> denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]."

Appeal to the Circuit Courts is a matter of right. 28 U.S.C. § 1291. The Tenth Circuit's avoidance to rule upon a claim, not only clearly articulated to the Circuit Court but clearly and repeatedly urged to the trial court, upon the basis the issue was "raised for the first time on appeal" denies an opportunity to be heard as surely as if the trial court precluded any adjudication below.

Where denial of consideration of petitioner's major appellate claim is predicated upon a misconstruction of the record, in which misconstruction the Circuit Court persists even after the misconstruction of record is clearly demonstrated by the appellate party whose substantive appellate claim is ignored, then such denial of an appellate decision upon the gravamen of the appeal is tantamount to denial of an opportunity to be heard. And in such circumstance this Court, as it stated in *Societe Internationale v. Rogers, supra,* and under Sup. Ct. R. 10(a), should impose the Fifth Amendment's requirement for a meaningful hearing as a limitation upon the Circuit Court's discretionary power to decline to decide a properly presented appellate claim, and remand the matter to the Tenth Circuit with instructions to decide the respondent's duty to meet its Section 501 duties under the factual record presented by the trial evidence.

III.

THE DECISION BELOW IS IN CONFLICT WITH NUMEROUS OTHER CIRCUITS

This case concerns the Tenth Circuit's construction and interpretation of the affirmative action duties imposed on federal government employers under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791, and appurtenant regulations, to reasonably accommodate a qualified handicapped individual. This case, along with the other disability

cases currently before the Court,[6] presents the opportunity to provide lower courts with clear guidelines for determining whether a federal government employer has satisfied its heightened Section 501 duties to determine whether a handicapped person is qualified for employment. In addition, this case presents the opportunity to provide lower courts and federal government employers with a single, clear standard for resolving the "mitigating measures" and "handicapped" issue under Section 501 of the Rehabilitation Act. Finally, this case presents the opportunity to provide lower courts and, both, private and federal government with a single, clear standard for addressing job performance deficiencies that are symptomatic of a disability or handicap.

A. Mitigating Measures

The evidence at trial was undisputed that the respondent took no affirmative steps during the petitioner's reemployment application process to reasonably accommodate Mr. Gresham's known disability of epilepsy because the respondent did not consider Mr. Gresham to be "disabled" due to his seizure-free epileptic condition which was the result of mitigation measures of tegretol monotherapy. The opinion below upholding Jury Instruction No. 16, and the respondent's approach to Mr. Gresham's seizure-free handicap condition, which is a result of the mitigating measures of tegretol monotherapy, are consistent with the Tenth Circuit's approach taken in the two ADA cases currently pending before this Court, *i.e.*, *Karen Sutton and Kimberly Hinton v. United Airlines, Inc.*, No. 97-1943; *Vaughn L. Murphy v. United Parcel Service, Inc.*, No. 97-1992. However, unlike the *Sutton* and

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[6] Oral arguments in the following ADA disability cases: *Karen Sutton and Kimberly Hinton v. United Airlines, Inc.*, No. 97-1943; *Vaughn L. Murphy v. United Parcel Service, Inc.*, No. 97-1992; *Albertsons, Inc. v. Hallie Kirkingburg*, No. 98-591; and, *Zimring v. Olmstead*, No. 98-536, have been heard and the decisions of this Court are pending. In addition, a *cert.* petition is pending in another ADA disability case involving epilepsy, *Allison Deas v. River West, L.P. et al.*, No. 98-1057.

Murphy cases, which were brought under the ADA, this case is brought against a federal government employer under Section 501 of the Rehabilitation Act.

Although courts have not squarely addressed the mitigating measures issue under the Rehabilitation Act, courts routinely treat persons who have mitigated the effects of their impairment as protected by the statute. *See, e.g., Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987) ("Reynolds's epilepsy substantially limits her ability to work. Even though medication controls her seizures, federal and state regulations and policies restrict the types of jobs available to her."); *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) ("undisputed" that applicant whose hearing aid corrected for hearing impairment "is a handicapped person"); *Longoria v. Harris*, 554 F.Supp. 102, 103-104 (S.D. Tex. 1982) (individual with right leg amputated below the knee who "was in no way restricted in mobility by his artificial leg" was handicapped individual).

A certiorari petition is pending in *Allison Deas v. River West, L.P., et al., Case No. 98-916*. Unlike this case, *Deas v. River West L.P., et al.* is brought under the ADA. However, as in this case, *Deas v. River West L.P., et al.* involves epileptic seizures. Accordingly, Mr. Gresham requests that this Court grant review of this case due to the importance of the related questions presented in the four disability cases under review, referenced, *supra*, grant review of *Deas v. River West, L.P., et al.*, and decide his case as a companion case to *Deas v. River West, L.P., et al. See Gordon v. New York Stock Exchange*, 422 U.S. 659, 663 (1975).

B. Manifestations of Disabling Medical Conditions

Perhaps the greatest opportunity to resolve a conflict among the Circuits afforded by this case concerns the different approaches regarding employers' responses to behavior or performance deficiencies that are manifestations of a disabling condition. Whether an employer's adverse action

taken in response to a person's poor behavior or job performance that is a manifestation of a disabling medical condition renders a handicapped person "not qualified" or whether it will be deemed discrimination "because of handicap", frequently turns on the district court or Circuit where the complaint is brought.

For example, there are two general approaches for addressing misconduct that is a manifestation of a disabling condition under the Rehabilitation Act. The First, Fourth, Sixth, Seventh, and Ninth Circuits follow the general approach adopted by the Tenth Circuit in *Williams v. Widnall*, 79 F.3d 1003, 1006-1007 (10th Cir. 1996) (agreeing with the Fourth Circuit's statement that "an employer subject to the Rehabilitation Act must be permitted to terminate its employee on account of egregious misconduct, irrespective of whether the employee is handicapped.") (*citing, Little v. FBI*, 1 F.3d 255, 259 (4th Cir. 1993)). In *Williams*, a Section 501 case, the Tenth Circuit held that an alcoholic suing under Section 501 of the Rehabilitation Act was disabled, but was not "qualified" because his misconduct of making threats toward a supervisor could not be reasonably accommodated without undue hardship because his threats to his supervisor and coworkers continued in spite of his treatment for alcoholism. *Williams v. Widnall*, 79 F.d at 1006. In *Williams*, the Tenth Circuit adopted the consensus approach that an employer subject to the Rehabilitation Act may take adverse action against a disabled employee in response to egregious misconduct that is a manifestation of a disabling condition "irrespective of whether the employee is handicapped." *Id.* at 1007. This general approach to an employer's response to an employee's misconduct that is a manifestation of a disabling condition under the Rehabilitation Act is the majority approach among the Circuits. *See, e.g., Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996) (civilian Navy employee discharged after he attempted to fire assault rifle at bar patrons while on "drunken rampage" was terminated for misconduct not "because of"

disability); *Maddox v. University of Tennessee*, 62 F.3d 843, 848 (6th Cir. 1995) (alcoholic football coach fired after well-publicized DWI incident was not discharged "because of" alcoholism but rather because of misconduct; "while alcoholism might compel Maddox to drink, it did not compel him to operate a motor vehicle or engage in the other inappropriate conduct reported"); *Despears v. Milwaukee County*, 63 F.3d 635, 636-37 (7th Cir. 1995) (demotion of maintenance worker whose driver's license was revoked after fourth DWI conviction was not solely because of alcoholism; "a cause is not a compulsion (a sole cause); and we think the latter is necessary to form the bridge that Despears seeks to construct between his alcoholism and his demotion . . . But Despears' alcoholism was not the only cause of his being convicted of drunk driving. Another cause was his decision to drive while drunk."); *Little v. FBI*, 1 F.3d 255, 259 (4th Cir. 1993)(Rehabilitation "Act does not protect alcoholics or drug addicts from the consequences of their misconduct."; *Taub v. Frank*, 957 F.2d 8 (1st Cir. 1992) (heroin addict discharged for misconduct of heroin possession, rather than for his heroin addiction).

On the other hand, in the Second Circuit, an employer's adverse action taken in response to an employee's misconduct that is a manifestation of a disabling condition is considered "discrimination because of disability." This minority general approach was adopted in the Second Circuit in *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511, 517 (2nd Cir. 1991), *cert. denied*, 506 U.S. 815 (1992). In *Teahan*, the Second Circuit held that an employee's termination by an employer subject to the Rehabilitation Act which was justified as being due to absenteeism shown to be caused by substance abuse is termination "solely by reason of" that abuse for purposes of the Rehabilitation Act.

Section 501 and its implementing regulations clearly impose upon a federal employer an affirmative duty to reasonably accommodate a known handicap in determining a

handicapped person's qualifications for federal employment. The regulations implementing Section 501 provide the "Agencies shall give full consideration to the hiring . . . of qualified . . . handicapped persons. The Federal Government shall become a model employer of handicapped individuals . . . [and] shall not discriminate against a qualified physically or mentally handicapped person." 29 C.F.R. § 1613.703 (Section 1613.703 is reproduced in the Appendix at p. 10a). In addition, the regulations mandate that a federal government employer "shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant . . . unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 29 C.F.R. § 1613.704(a) (Section 1613.704(a) is reproduced in the Appendix at p. 10a).

In addition, Jury Instruction No. 16, "Qualified Individual With A Disability", is set out at p. 14a of the Appendix and states:

> "The term 'qualified individual with a disability,' as used in these instructions, means an individual with a disability who nevertheless can perform the essential functions of the employment position he holds or desires, either with or without a reasonable accommodation, and who meets experience and education requirements of the position. Also, to be qualified, a person must be able to perform the desired job without endangering the health or safety of himself or others.
>
> In this case, the essential functions of the job Mr. Gresham sought as a Distribution Clerk are described in Defendant's Exhibit 15. He claims that he could perform these functions without receiving any accommodation whatsoever.
>
> There exists a Postal Service regulation that declares an employee ineligible for reinstatement once he has been removed from service for cause. This regulation

> does not override the Postal Service's obligation under the Rehabilitation Act to give individualized consideration to an application for reinstatement by an otherwise qualified individual with a disability. To establish that he is otherwise qualified, however, a disabled person seeking reinstatement must prove that his prior removal was caused by a disabling condition that has improved and is not likely to recur. *If the Postal Service had grounds for genuine concern that past problems would recur, it was not required to consider plaintiff's application further.*"

(App. p. 14a.) (Emphasis added.)

This Court should grant certiorari and resolve the split among the Circuits by holding that manifestations of a disabling medical condition does not abrogate a federal government employer's heightened affirmative duties under Section 501 to reasonably accommodate a handicapped person seeking employment. As a result of Jury Instruction No. 16, the Postal Service was absolved of its Section 501 affirmative duties to reasonably accommodate Mr. Gresham's current mitigated state of epilepsy disability wherein he is seizure-free. Because of his prior record of misconduct and poor job performance which was a manifestation of his unmitigated disabling condition of epileptic seizures, pursuant to Jury Instruction No. 16, "Qualified Individual with a Disability", Mr. Gresham was unduly prejudiced. This Court should grant certiorari, reverse, and remand. *See Poindexter v. Atchison, Topeka and Santa Fe Railway Co.*, 168 F.3d 1228, 1232 (10th Cir. 1999); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1516 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

IV.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The decision below is inconsistent with the rulings of this Court regarding the affirmative duties of a federal government employer to reasonably accommodate a handicapped person under the Rehabilitation Act. This Court's opinions in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 nn.17 & 19 (1987) (employers have an affirmative obligation to make a reasonable accommodation to an employee unless the reasonable accommodation would cause "undue hardship"); and, in *Southeastern Community College v. Davis*, 442 U.S. 397, 410-12, (1979) (Section 501 explicitly requires federal government employers to undertake "affirmative action") gave effect to the guiding principle that employers subject to the Rehabilitation Act have an affirmative obligation to reasonably accommodate an individual with a known handicap unless to do so would cause undue hardship. *Id.* Moreover, this Court's opinion in *Arline* indicated that a district court "will need to conduct an *individualized inquiry* and make appropriate findings of fact" in order to determine whether a handicapped individual can perform the essential functions of the job with a reasonable accommodation. *Arline*, 480 U.S. at 288-89 (emphasis added).

In this case, neither the district court nor the jury made any findings of fact regarding whether Mr. Gresham could perform the essential job functions of postal distribution clerk. The only evidence adduced at trial was that petitioner could—at the time of his 1993 application—safely and competently perform *all* functions of the job for which he applied. Especially because this case was brought against a federal government employer under Section 501 of the Rehabilitation Act, the district court should have made an individualized inquiry and findings of fact regarding whether petitioner could work as a distribution clerk.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted. The Petitioner further requests that the Court grant review of this case and consolidate it with the other four disability cases under review, consolidate it with *Deas v. River West, L.P., et al.*, Case No. 98-916 (*cert.* petition pending), or simply hold this case pending the disposition of the other disability cases.

In the alternative, because the Court of Appeals below expressed no views on the Section 501, mitigation, or the manifestation of a disabling condition issues, it may be appropriate for this Court to simply remand the case rather than deal with the merits of those questions in this Court. *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196, 2213 (1998) (*citing, Dandridge v. Williams*, 397 U.S. 471, 476, n.6 (1970)).

Dated: June 7, 1999.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-6029
Filed March 10, 1999

CHARLES F. GRESHAM,

Plaintiff-Appellant,

—v.—

MARVIN T. RUNYON, Postmaster General
United States Postal Service,

Defendant-Appellee.

Before PORFILIO, BARRETT, and KELLY, *Circuit Judges.*

ORDER

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

by: [ILLEGIBLE]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-6029
(D.C. No. 96-CV-33)
(W.D. Okla.)
Filed December 14, 1998

CHARLES F. GRESHAM,

Plaintiff-Appellant,

—v.—

MARVIN T. RUNYON, Postmaster General
United States Postal Service,

Defendant-Appellee.

Before PORFILIO, BARRETT, and KELLY, *Circuit Judges.*

ORDER AND JUDGMENT*

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Charles F. Gresham filed suit alleging the United States Postal Service violated the Rehabilitation Act, 29 U.S.C. §§ 791, 794, when it declined to reinstate him to his former employment with the Postal Service because of his disability, epilepsy. Following a jury trial, the jury returned a verdict in favor of defendant. Plaintiff appeals the district court's rulings during trial and its order denying his post-trial motion for judgment as a matter of law and motion for a new trial. We affirm.

Plaintiff worked for the Postal Service until 1986 when he was discharged for on-the-job incidents he alleges were caused by his epilepsy. He was subsequently granted medical retirement from the Postal Service. Following a new drug therapy, plaintiff's condition improved and he applied to be rehired by the Postal Service in 1993. The Postal Service reviewed his work history and other documents, but not his medical records, and declined to offer him a position. Plaintiff maintains that he was entitled to an individualized consideration of his application because his past problems were caused by his disability. He claims the Postal Service's failure to accommodate him in the hiring process violated the Rehabilitation Act.

Plaintiff first challenges a sentence in jury instruction sixteen informing the jury that the Postal Service was not required to consider his application further if it had genuine concerns that plaintiff's past problems would recur. He argues that the instruction erroneously permitted the jury to find that the Postal Service was not required to consider his improved medical condition. "We review a district court's decision on whether to give a specific jury instruction for abuse of discretion, but we review the instructions themselves de novo to determine whether as a whole they state the governing law and provide the jury with a proper understanding of the issues." *Gunnell v. Utah Valley State College*, 152 F.3d 1253,

1259 (10th Cir. 1998). Here, the instructions properly guided the jury in its deliberations. The jury was free to conclude that the Postal Service believed plaintiff's problems would recur for reasons not related to his disability or that he was not qualified for the position he sought, thereby relieving the Postal Service from an obligation to evaluate his application further. *Cf.* 29 U.S.C. §§ 791, 794 (prohibiting disability discrimination against person otherwise qualified for job). Therefore, the district court did not abuse its discretion in giving the challenged instruction.

Plaintiff claims he was entitled to a judgment as a matter of law or a new trial pursuant to Fed. R. Civ. P. 50 and 59. We review de novo an order denying a party's request for a judgment as a matter of law, and will "upset the jury's conclusion only if the evidence points but one way and is susceptible to no reasonable inferences supporting the nonmoving party." *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1238 (10th Cir. 1998) (quotation omitted). An order denying a motion for a new trial is reviewed for an abuse of discretion and will be reversed "only if [the district court] made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* at 1246 (quotation omitted).

Plaintiff argues that the Postal Service violated the Rehabilitation Act when it failed to examine whether his past unfavorable work record was caused by his disability and failed to evaluate his present medical condition. The jury heard evidence and received instructions on plaintiff's theory of his case. It was not required to find in plaintiffs favor. Rather, the jury was charged with evaluating the evidence and making the ultimate conclusions of fact. As stated above, the jury was free to find that plaintiff was not qualified for the position or that the Postal Service's hiring decision was not related to his disability. "[O]n appeal we view the evidence in the light most favorable to the jury's verdict and defer to its determinations on all issues of credibility of the witnesses, the inferences it may draw from the facts established, its resolution of conflicts in the evidence, and its ultimate conclusions of

fact." *Lampkin v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of Am. (UAW)*, 154 F.3d 1136, 1142 (10th Cir. 1998). Under this standard, we affirm the district court's order denying plaintiffs motion for a judgment as a matter of law or a new trial.

Plaintiff next claims the district court erred in prohibiting him from eliciting the opinion testimony of his friend and former coworker that the Postal Service's stated reasons for not rehiring him were pretextual. We find no abuse of discretion in that ruling. *See Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1268 (10th Cir. 1998) (district court's evidentiary rulings reviewed for abuse of discretion). Finally, we decline to address plaintiff's claims that the Postal Service failed to meet its affirmative burdens because the issue was raised for the first time on appeal. *See Walker v. Mather (In re Walker*, 959 F.2d 894, 896 (10th Cir. 1992) (appellate court will not consider issue on appeal that was not raised in district court).

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

Entered for the Court

Paul J. Kelly, Jr.
Deputy Clerk

29 U.S.C. § 791(b)

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Office of Personnel Management and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Office, if the Office determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

Subpart G—Prohibition Against Discrimination Because of a Physical or Mental Handicap

General Provisions

§ 1613.701 Purpose and applicability

(a) *Purpose*. This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of physical or mental handicap and the regulations under which an agency will process complaints of discrimination based on a physical or mental handicap.

(b) *Applicability*. (1) This subpart applies to executive agencies as defined in section 105 of title 5 of the United States Code and to those positions in the legislative and judicial branches of the Federal Government and the government of the District of Columbia which are in the competitive service.

(2) This subpart applies to the U.S. Postal Service and Postal Rate Commission.

(3) This subpart applies only to applicants and employees who have a handicap as defined in § 1613.702(a).

§ 1613.702 Purpose and applicability.

(a) *Handicapped person* is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded has having such an impairment.

(b) *Physical or mental impairment* means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; muscoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psy-

chological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(c) *Major life activities* means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(d) *Has a record of such an impairment* means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities.

(e) *Is regarded as having such an impairment* means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in paragraph (b) of this section but is treated by an employer as having such an impairment.

(f) *Qualified handicapped person* means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or

(2) Meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

§ 1613.703 General Policy.

Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person.

§ 1613.704 Reasonable accommodation.

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

29 C.F.R. § 1614.203(d)(1)

(d) *Employment criteria.* (1) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with handicaps or any class of individuals with handicaps unless:

(i) The agency demonstrates that the test score or other selection criterion is job-related for the position in question and consistent with business necessity; and

(ii) OPM or other examining authority shows that job-related alternative tests, or the agency show that job-related alternative criteria, that do not screen out or tend to screen out as many individuals with handicaps are unavailable.

29 C.F.R. § 1630.2(o)(i)

(o) *Reasonable accommodation.* (1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

USPS Handbook Policy 313.53

313.53 Policy. It is USPS policy to refuse employment to persons who were removed from the Postal Service or from other federal employment for cause, or who resigned after being notified that charges proposing removal would be, or had been, issued. In exceptional cases where appointment of such an individual is contemplated, approval of the Field Director, Human Resources, or Manager, Employment and Development, must be obtained before employing any such former postal or federal employee. *Exception:* Division approval is not required if the former employee was separated for scheme or other qualification failure, and if the job for which considered does not require a similar ability. For example, a clerk separated solely for scheme failure could be considered for a carrier or mailhandler position without division approval.

INSTRUCTION NO. 16

"QUALIFIED INDIVIDUAL WITH A DISABILITY"—DEFINED

The term "qualified individual with a disability," as used in these instructions, means an individual with a disability who nevertheless can perform the essential functions of the employment position he holds or desires, either with or without a reasonable accommodation, and who meets experience and education requirements of the position. Also, to be qualified, a person must be able to perform the desired job without endangering the health or safety of himself or others.

In this case, the essential functions of the job Mr. Gresham sought as a Distribution Clerk are described in Defendant's Exhibit 15. He claims that he could perform these functions without receiving any accommodation whatsoever.

There exists a Postal Service regulation that declares an employee ineligible for reinstatement once he has been removed from service for cause. This regulation does not override the Postal Service's obligation under the Rehabilitation Act to give individualized consideration to an application for reinstatement by an otherwise qualified individual with a disability. To establish that he is otherwise qualified, however, a disabled person seeking reinstatement must prove that his prior removal was caused by a disabling condition that has improved and is not likely to recur. If the Postal Service had grounds for genuine concern that past problems would recur, it was not required to consider plaintiffs application further.

THE COURT—COUNSEL

MR. GARDENHIRE: Your Honor, if Mr. Feagins may join me, it may speed this up, not to argue but help me do some of the paperwork.

Your Honor, the basis of this motion is attendant upon Section 501 or 29 USC 791's requirement of an affirmative duty on behalf of the government to suggest reasonable accommodations in the face of a known disability. And I understand the Court's ruling with respect to disability. Let me make a very brief qualifying argument with regard to a disability, or indeed a record of disability, both of which are considered disabilities under the CFR and the statute.

That is that with respect to even the first prong, we contend that Mr. Gresham, is, in fact, disabled because the sole proof here, from not Mr. Gresham but his attending physician, is that he has epilepsy, which I think, a matter not open to serious dispute, uncontrolled would impair—substantially impair a major life function because he would go into convulsions but for the medicine.

We contend that the medicines only change one thing: They no longer make him not disabled but merely now a disabled person who is a qualifying individual to work, otherwise qualified notwithstanding that disability.

We contend in that regard that once that was made known or reasonably known, together with the request to not consider the work record, that that causes affirmative obligation upon the federal employer to suggest accommodations. And the testimony, if you may recall with Mrs. Littleton, I was trying to determine is she did anything in that regard, and the response was, "not until we make a job offer and then we—"

THE COURT: You know, they're in a box on that because if they start inquiring about these medical matters before they make a job offer, then they're violating regulations implementing the ADA.

MR. GARDENHIRE: Your Honor, that's correct, I'm not—again, there are a number of—what did I say earlier, oxymorons, procedural oxymorons. But here's the suggestion under the CFRs there are two particular regulations, and they're short, if I may get them.

THE COURT: And think about this, too, in connection with the argument: That I've already stated as—in response to Mrs. Thompson's argument that the entitlement under the Act is to individualized consideration and not for the job.

MR. GARDENHIRE: Yes, sir.

THE COURT: And I adhere to that with respect to your argument.

MR. GARDENHIRE: Yes, sir.

THE COURT: And consider also that even though Mr. Gresham says he's now okay, Doctor King says he's now okay, Mrs. Gresham says he's now okay, his friend says he's now okay. Boy, a friend like that we should all have, too, you're a very good friend. He still has presented himself simultaneously as being permanently and totally disabled, and the jury may well evaluate Doctor King's evidence without accepting it all. They don't have to conclude that there's no prospect of future recurrence of the conduct. And on those bases the jury could find, we don't have to hire him because he is disabled and disqualified.

MR. GARDENHIRE: Your Honor, I understand. And to clarify, again, I believe my argument does not raise those issues that were presented and the Court adjudicated, and I do accept under Pushkin and other cases that it is an individualized inquiry. If I may just very quickly quote one provision of 29 CFR Section 1614.203, the implementing regulations of the Rehabilitation Act, subpart—these are hard to read, subpart 6(d), I think is correct, but I will read it. It's employment criteria which says "An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with handicaps or any class."

That's the narrow provision that I'm referring to. And, of course, the ADA is considered in tandem, and under its reasonable accommodations, this only goes to the application process.

THE COURT: I understand. And I've already ruled that the Postal regulation on absolute bars cannot trump the Rehabilitation Act.

MR. GARDENHIRE: That's basically the essence of this motion, Your Honor.

THE COURT: But that doesn't mean that he gets the job.

MR. GARDENHIRE: No, sir. But what I'm arguing is—oh, I'm sorry, if I may. "Reasonable accommodation," that's under 29 CFR Section 1630.1—I'm sorry, Section 1630.2, subpart 2, "Reasonable accommodation may include—" I'm sorry, Subpart O, "The term 'reasonable accommodation' means modifications or adjustments to a job application process that enable a qualified applicant with a disability be considered for the position."

Those two things I read together, plus the requirement under Section 291—correction, 791, that there is an affirmative duty on behalf of the government employer to suggest an accommodation, and the undisputed evidence that no accommodation was even suggested would argue not for total damages or total liability but a finding at the close of evidence that the government failed in that respect to come forward with an affirmative obligation. And we've cited the Crane case, I know. Another case is the Buckingham case and I don't have the cite handy, I gave it to your law clerk yesterday, but that the evidence—the uncontroverted evidence is that in the face of a known disability, the government failed to come forward with any suggested accommodation. And that, while it might not award damages, at least in the equitable aspect would invite the Court's order directing the government to do that.

THE COURT: Let me repeat to Mrs. Thompson, I'm going to deny the motion unless you talk me out of it.

MRS. THOMPSON: Your Honor, but I just have to make one small response.

My opinion is that the status of the law is, our duty to accommodate doesn't rise until he comes forward with evidence that he needs accommodating or requests an accommodation. In this instance, he isn't asking for any accommodation from anybody.

And lastly on the trump issue, the law says that an employer does not have to tolerate egregious conduct from a handicapped person that he wouldn't have to tolerate from a non-handicapped person. And so I understand the Court has some concern about this postal policy, as you say, trumping the Rehabilitation Act, but the Tenth Circuit has made it clear that if the conduct—if the conduct is disqualifying separate and apart from the disability, the courts are not to inquire into agency policy that's based on sound policies and discretion.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. CIV-96-0333-A
Filed October 20, 1997

CHARLES F. GRESHAM,

Plaintiff,

—VS.—

MARVIN T. RUNYON, JR., Postmaster General,
United States Postal Service,

Defendant.

PLAINTIFF'S MOTION FOR JUDGMENT N.O.V. AND MOTION FOR NEW TRIAL

Plaintiff, Charles, F. Gresham, pursuant to Rules 50(b) and 59, Fed.R.Civ.P., moves the Court to enter Judgment in favor of Plaintiff notwithstanding the verdict of the jury and, also, moves the court for a new trial, upon the grounds that:

(1) The verdict was against the great weight of evidence;

(2) The jury was improperly instructed that defendant could avoid its affirmative obligation to accord reasonable accommodation to a disabled person, who was otherwise qualified, upon a belief that the disabled person posed a threat to the

agency, thereby necessitating a new jury trial upon the issues of defendant's liability for damages; and,

(3) The jury's verdict could in any event not obviate the defendant agency's affirmative duty to extend a reasonable accommodation in the application process to a disabled person who had adduced evidence, unrebutted at trial, that the medical condition which had caused his prior work record was now under complete medical control; and the Court should in its equitable power and in aid of the legal requirement for an individualized remedy, based upon evidence that the plaintiff is and was at trial an otherwise qualified, disabled person, enter judgment against the defendant based upon its failure to extend reasonable accommodation, and further order that defendant extend a reasonable accommodation to plaintiff, by first, acknowledging that the prior work record was in whole or substantial part a product of plaintiff's disability, then uncontrolled, and second, that the defendant perform medical tests to confirm or deny Dr. King's opinion that Gresham's epilepsy and the byproducts thereof are now under medical control, allowing plaintiff to perform the essential job functions.

All as is more fully set forth in the supporting brief filed herewith and which is respectfully submitted.

/s/ GARY W. GARDENHIRE
GARY W. GARDENHIRE, OBA# 3235
KENNETH FEAGINS, OBA# 16560
629 24th Avenue S.W.
Norman, Oklahoma 73609
(405) 360-9700
(405) 360-7902 (fax)

ATTORNEYS FOR PLAINTIFF

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
CIVIL SERVICE RETIREMENT SYSTEM
Washington, D.C. 20415

Disability and Special Entitlements Division
Decision Summary

1. Name of Case ☑ Initial ☐ Reconsideration ☐ Appeal
2. New Evidence ☑ Yes ☐ No
3. Charles F. Gresham
4. Case Number A2578756
5. Age 40
6. Position Distribution clerk
7. Agency USPS
8. Pay Status ☐ LWOP ☐ Separated In Pay
9. Application Date 6-10-86
10. Filed by Dept. ☐ Yes ☑ No
11. Filed by OWCP ☐ Yes ☑ No

Summary of Applicant's Claim: Mixed epilepsy

Administrative Criteria

☑ 5 years creditable civilian service
☐ applied within 1-year limit (initial)
☐ 30-day time limit (recon)
☐ time limit waived

Disability Criteria

For each section, mark "yes" or "no".

NOTE: Comment on adequacy of evidence, cite specific evidence in case file, and explain the basis for your decision.

EVIDENCE IN THE CASE FILE IS ADEQUATE TO PROVE:

☑ Yes ☐ No

1. A DEFICIENCY IN SERVICE or the medical condition is incompatible with either useful service or retention in the position. (If yes, check either (a) or (b) below:)

   ☑ (a) a documented deficiency in service in either:
   - ☑ (1) performance,
   - ☑ (2) conduct, or
   - ☑ (3) attendance

   (Comment on conflicting evidence [e.g., performance recognition] and extent of absences.)

   See Supv. Stmt. to docum. appl's def. in svc.

   5/25/85 unacceptable

   OR

   ☐ (b) if there is no documented service deficiency, is there a medically warranted restriction from performing essential duties or from the workplace, based on the risk of:
   - ☐ (1) sudden or subtle incapacitation,
   - ☐ (2) further health impairment caused by working, or
   - ☐ (3) transmission of communicable disease.

   (Comment on likelihood and consequences of (1), (2), or (3).)

EVIDENCE IN THE CASE FILE IS ADEQUATE TO PROVE:

☑ Yes ☐ No

2. there is sufficient and relevant information documenting the presence of a medical condition, which is defined as a disease or injury. (Comment on history of condition and diagnostic/clinical testing.)

Paranoid features

Organic Brain Syndrome

Epilepsy petite mal and psychomotor epilepsy and increased paranoid features.

Have worked for [ILLEGIBLE] years to keep his job but has reached a point now it is impossible therefore recommend retirement

☑ Yes ☐ No

3. the MEDICAL CONDITION HAS CAUSED EITHER THE SERVICE DEFICIENCY or THE RESTRICTION from performing essential duties or from the workplace (If restrictions are warranted, either list the restrictions or identify the documents where the restrictions appear.)

Med. cond. has caused def. in serv. Appl. is unable to perf. in any employment capacity. Restr. from phys. are worr.

☑ Yes ☐ No

4. the medical condition will CONTINUE for at least a year from onset of condition. (Comment on whether the condition has stabilized, whether conclusions about prognosis and recovery expectations are warranted, and extent to which condition can be controlled or treated. Explain basis for decision for "no call-up" or "call-up".)

5609 Med. cond. is pre-existing and appl. has shown worsening of cond. Prognosis at this time is guarded. Recall in 3 yrs. to check phis. & mental status.

Signature [ILLEGIBLE] Date 9/15/86

EVIDENCE IN THE CASE FILE IS ADEQUATE TO PROVE:

☑ Yes ☐ No

5. the applicant's inability to render useful and efficient service due to a medical condition WHILE serving under the Civil Service Retirement System. (Indicate date of onset of medical condition.)

Appl. is unable to render useful & eff. serv. Date of incap. is 5/86.

☑ Yes ☐ No

6. the agency's inability to make REASONABLE ACCOMMODATION to the employee's medical condition. (Comment on agency efforts and reasons for not implementing ideas that were considered.)

Accomm. is not an option due to appl.'s med. cond.

☑ Yes ☐ No

7. absence of ANOTHER AVAILABLE POSITION, within the employing agency and commuting area at the same grade or pay level and tenure, for which the employee is qualified and for which accommodation would be reasonable. (Note if employee has refused reassignment.)

Med. cond. precludes reassign.

CONDITIONS FOR STAFF MEDICAL OFFICER

Signature of Disability Claim Specialist/Examiner
Cori Goskins

Date 9/16/86

MEDICAL OFFICER RESPONSE and COMMENTS:

Signature of Staff Medical Officer

Date

E: Medical Assessment

1. Medical History: Based upon review of Examinee's Medical History, Section B of this Form, [ILLEGIBLE HANDWRITTEN WORDS] records, (*if applicable*), outside medical records, etc., check appropriate box.

Note any significant past medical data that is pertinent to the physical requirements of the essential functions of the position applied for:

- ☐ No Significant Findings
- ☒ Significant Findings as Noted Below:
  Long history epilepsy & psychomotor seizures with amnesia.

2. Physical Findings: Based upon a complete hands-on physical examination, check appropriate box, and note any restrictions (*physical inabilities*) and/or limitations (*partial physical inabilities*) identified.

Note referral for specialist exam as required:

- ☒ No Limitations/Restrictions
- ☐ Limitations/Restrictions as Noted Below:
- ☐ Specialist Exam Required

3. Employment History: Based upon review of examinee's Form 2591, Application for Employment (*if applicable*). Supervisory Evaluations, prior job descriptions, etc., check appropriate box.

Note any significant historical employment data that is pertinent to any past or current medical condition noted. Note only that employment data which supports the examinee's ability or inability to perform the essential functions of the position for which the examinee has applied.

- ☐ No Significant Findings
- ☒ Significant Findings as Noted Below:

Psychomotor seizures at work, temporarily (up to 1/2 Hr) leading him to forsake his duties.

4. Risk Assessment: Based upon a review of findings as noted in nos. 1-3, above, indicate assessment of applicant's risk of incurring job related injury or illness, within the next six months, due to existing or past medical conditions.

☐ No Medical Risk/Restriction: Examinee is medically qualified to perform essential functions of the position without accommodation.

☐ Low Risk/Restriction: Examinee is medically qualified to perform the essential functions of the position at the time of examination, but periodic medical follow-up is recommended. (*See No. 5 below*)

☒ Moderate Risk/Restriction: Examinee would be medically qualified to perform essential function of the position only if above-noted limitations/restrictions can be accommodated (*See No. 5 below*)

☐ High Risk/Restriction: Applicant is not medically qualified to perform essential functions of the position. Accommodation will not reduce medical risk or restriction.

5. Suggested Accommodations: (*Job modifications which would allow applicant to perform essential functions of the positions effectively and safely.*)

No driving, working around moving machinery, customer contact, responsibility for [ILLEGIBLE] postage stamp or working alone.

Signature of Medical Authority
William E. Hill MD

Date 10/18/85

[stamp] William E. Hill MD
Area Medical Officer
U.S. Postal Service
320 S. W. 5th, ROOM 156
Oklahoma City, OK 73125-9409

OKLAHOMA MEMORIAL HOSPITAL
NEUROLOGY DEPARTMENT, RM. 6E-238
P. O. BOX 26307
OKLAHOMA CITY, OKLAHOMA 73126
405/271-3635

August 4, 1992

RE: Charles Gresham

To Whom It May Concern:

I have been asked to provide an update of medical condition for the above named patient. I have followed Mr. Gresham since October of 1990 when he was hospitalized for evaluation of seizures. At the time he was having these episodes multiple times per day. He was started on Tegretol in December of 1990 and since then has remained seizure free. He was taken off of his other seizure medications during this period of time. He was last examined on March 5, 1992 at which point he was found to have a normal neurological examination as well as partial general physical examination. His weight was 82.7 kilos, BP 130/78, pulse 76. He had a Tegretol level performed on that date indicating excellent compliance with a therapeutic level of 7.9 as well as a normal CBC and Chem-18. No other diagnostic testing has been performed recently. He currently carries a diagnosis of complex partial epilepsy. He appears to have complete control of his epilepsy on the current management and his prognosis for future control is quite good. He has been released to all pre-existing activities short of he is not allowed to fly airplanes commercially. It is not recommended that he be a scuba diver instructor. He is allowed to legally drive since he has demonstrated excellent compliance

and has been seizure free for greater than 1 year. He is encouraged to use good judgement and to take his medications faithfully.

Sincerely,

JEANNE ANN KING, M.D.
Jeanne Ann King, M.D.
Assistant Professor
Department of Neurology

Supreme Court, U.S.
FILED
AUG 9 1999
OFFICE OF THE CLERK

No. 98-1968

In the Supreme Court of the United States

CHARLES F. GRESHAM, PETITIONER

v.

WILLIAM HENDERSON, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the jury correctly found that the Postal Service's refusal to rehire petitioner was based on factors unrelated to his record of a disability.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-6a) is unpublished, but the decision is noted at 166 F.3d 347 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1998. A petition for rehearing was denied on March 10, 1999. The petition for a writ of certiorari was filed on June 8, 1999 (Pet App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner has been an epileptic since childhood and first began having seizures at work in 1978. Ac-

cording to the testimony of petitioner and his physician, these seizures would last no longer than 25 minutes, during which petitioner would go into a trance-like state and be either unresponsive or disoriented and confused. Gov't C.A. Br. 3-4.

Petitioner worked for the United States Postal Service as a distribution clerk beginning in May 1966. Pet. 3. In 1986, the Postal Service discharged petitioner for several on-the-job incidents. The Notice of Removal set out three charges. The first charge concerned erratic behavior during contacts with customers that made petitioner unable to meet the requirements of his position. In particular, petitioner took $10 from a customer who wanted stamps, put the money in his pocket, and took off his tie and unbuttoned his shirt; he took $25 from a customer, said "Oh my God," and left the building; he threatened a customer at his counter by warning her that he was "crazy enough to do anything"; and he responded to a customer's putting $20 on the counter by saying it was "time for me to go" and leaving. Pet. C.A. Br. App. Addendum, PX 29, at 1.

After two such incidents, petitioner submitted assurances from doctors that his problems were under control, and the Postal Service abandoned plans to demote him. When a "fitness for duty" examination showed that petitioner's problems were not under control, the Postal Service attempted to accommodate him by moving him to a temporary position answering the phone and setting meters. Pet. C.A. Br. App. Addendum, PX 29, at 1-2.

The second charge concerned misconduct. The Notice of Removal recited the Postal Service's difficulties in finding work for petitioner after he was removed from his window position, set out its efforts to accommodate him with a light duty assignment, and

charged him with sabotaging those efforts by going AWOL rather than working the assignment it had found for him. Pet. C.A. Br. App. Addendum, PX 29, at 2.

The third charge involved threatening postal employees. The charge specified that, in a conversation with a Labor Relations Assistant:

> You told him that you could not be responsible for your actions, that you were psychotic. As the conversation went on, you told him that you had two firearms charges against you, and that you were dangerous. Not only did the Labor Relations Assistant feel threatened by these comments, but you pose a potential threat to others with whom you have to work.

Pet. C.A. Br. App. Addendum, PX 29, at 2.

Shortly after the effective date of his removal, petitioner applied to the Office of Personnel Management for disability retirement. His application was granted in September, 1986. Pet. App. 4a, 21a-24a.

2. In April 1993, petitioner requested reinstatement to his former employment with the Postal Service. Petitioner stated that his previous "retirement" was based upon seizures that interfered with his ability to perform his duties, and that new drug therapy had abated his seizures. Pet. App. 4a.

The Postal Service official who made the decision whether to rehire petitioner, Ms. Littleton, testified that she reviewed petitioner's work history, including his official personnel file and the previous Notice of Removal. Pet. App. 4a; Pet. C.A. Br. App. 263-272. These showed that petitioner had been disciplined several times for excessive absenteeism, and had been suspended several times. *Id.* at 268-269. Ms. Littleton

did not believe there was a connection between petitioner's medical condition and excessive absenteeism, *id.* at 202, and petitioner himself testified that there were times when his absenteeism was not caused by his epilepsy, *id.* at 116-117.

Ms. Littleton also consulted petitioner's "rap sheet," which showed several arrests. Pet. C.A. Br. App. 259. Petitioner had been fined $10 in 1968 for aggravated assault in an incident that arose from a domestic dispute. Pet. C.A. Br. App. Addendum, PX 35; see also Pet. C.A. Br. App. 82-83. In addition, petitioner had been arrested and charged with aggravated assault in 1982, in an incident in which he brought a gun to the office of his ex-wife. *Id.* at 84-86. The latter charges ultimately were dropped. *Id.* at 87. There was no evidence that petitioner was in a "trance-like" state or exhibited other signs of epilepsy at the time of these incidents.

The Postal Service declined to offer petitioner a position. In a letter to petitioner, Ms. Littleton explained that the Postal Service considers a number of factors in reaching a decision on reinstatement requests, including "safety, attendance, work performance and attitude," and that its decision declining to reinstate petitioner was based upon his work records and evaluation at the time of his separation from the Postal Service. Pet. C.A. Br. App. Addendum, PX 5. Ms. Littleton testified that when she referred to "work performance" she included his disciplinary record. Pet. C.A. Br. App. 266-267. She also testified that her reference to "safety" included a Postal Service policy of "zero tolerance" policy concerning violence in the workplace, which covers threats and perceived threats. *Id.* at 253.

3. Petitioner brought this action, alleging that the Postal Service violated the Rehabilitation Act of 1973, 29 U.S.C. 791, 794, in refusing to rehire him in 1993. Following a jury trial, the jury returned a verdict for the Postal Service. Pet. App. 4a. The district court denied petitioner's motion for judgment as a matter of law and his motion for a new trial, and petitioner appealed.

4. The court of appeals affirmed. Pet. App. 3a-6a. The court first held that the district court did not abuse its discretion in instructing the jury that the Postal Service was not required to consider petitioner's application further if it had genuine concerns that petitioner's past problems would recur. The court rejected petitioner's contention that the instruction improperly permitted the jury to find that the Postal Service was not required to consider petitioner's improved condition. As the court explained, "The jury was free to conclude that the Postal Service believed plaintiff's problems would recur for reasons not related to his disability or that he was not qualified for the position he sought, thereby relieving the Postal Service from an obligation to evaluate his application further." *Id.* at 5a.

The court of appeals also rejected petitioner's contention that he was entitled to judgment as a matter of law or a new trial. Pet. App. 5a-6a. With respect to petitioner's contention that the Postal Service violated the Rehabilitation Act by failing to examine whether his past work record was caused by his disability and by failing to take into account his present medical condition, the court of appeals concluded that "[t]he jury heard evidence and received instructions on plaintiff's theory of his case," but that "[i]t was not required to find in [his] favor." *Id.* at 5a. Based on the evidence in

this case, "[t]he jury was free to find that plaintiff was not qualified for the position or that the Postal Service's hiring decision was not related to his disability." *Ibid.*

The court of appeals also held that the district court did not abuse its discretion in excluding testimony from a friend and former coworker of petitioner that the Postal Service's reasons for not rehiring petitioner were pretextual. Pet. App. 6a. Finally, the court of appeals stated that it would "decline to address [petitioner's] claims that the Postal Service failed to meet its affirmative burdens because the issue was raised for the first time on appeal." *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioner received every opportunity to present his theory of the case to the jury, and that the district court committed no reversible error in conducting the trial. The unpublished decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 7-12) that further review is warranted to consider whether mitigating measures, such as medication, should be considered in determining whether petitioner is disabled under the Rehabilitation Act. He states that the Postal Service concluded that he was not disabled in 1993, when he sought to be rehired, only because the Postal Service took into account the medication he was taking for his epilepsy in assessing his condition.

This issue is not properly before the Court. The jury was instructed that petitioner was asserting that he had a "past record or history of a substantially limiting condition" when he applied for reemployment in 1993, Pet. C.A. Br. App. 443, not that he had an "actual"

disability at that time. See 29 U.S.C. 706(8)(B) (defining disability in terms of actual disability, record of a disability, or regarded as disability). Petitioner did not object to the absence of any language regarding mitigating measures in the instructions, nor did he request any jury instruction that would have addressed the mitigating measures issue. And petitioner's briefs in the court of appeals did not raise (and the court of appeals did not address) any issue regarding mitigating measures.

In any event, this Court has recently resolved the question whether mitigating measures should be taken into account in assessing the existence of a disability under the Americans with Disabilities Act of 1990 (ADA), and it has rejected the argument petitioner presents here. In *Sutton* v. *United Air Lines, Inc.*, No. 97-1943 (June 22, 1999), this Court held that "disability under the Act is to be determined with reference to corrective measures." Slip op. 15. See also *Albertson's, Inc.* v. *Kirkingburg*, No. 98-591 (June 22, 1999), slip op. 9 (noting that "mitigating measures must be taken into account in judging whether an individual possesses a disability."). The definition of "disability" in the ADA, 42 U.S.C. 12102(2), is "drawn almost verbatim," *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2202 (1998), from the Rehabilitation Act. Compare 42 U.S.C. 12102(2) (ADA) with 29 U.S.C. 706(8)(B) (Rehabilitation Act). Accordingly, there is no reason to believe that the rule regarding mitigating measures would be any different under the Rehabilitation Act. Thus, the Court has already rejected petitioner's position that mitigating measures should not be taken into account in determining the existence of a disability.

2. Petitioner contends (Pet. 12-15) that the Tenth Circuit erred by declining to address his contention that

the Postal Service failed to meet its affirmative burden of accommodating those who are disabled. The "affirmative burden" to which he refers appears to be the burden of extending to him what he believes to be the "reasonable accommodation" of "perform[ing] medical tests to confirm or deny [a physician's] opinion that [petitioner's] epilepsy and the byproducts thereof are now under medical control, allowing [petitioner] to perform the essential job functions." Pet. 13-14 (quoting Pet. App. 20a). See also Pet. C.A. Br. 35 (stating claim as based on the fact that petitioner "asked [the Postal Service] to accommodate his disability during the application process by taking his epilepsy into account as the cause of his prior poor work record").

The court of appeals did address this contention. It noted that petitioner "argues that the Postal Service violated the Rehabilitation Act when it failed to examine whether his past unfavorable work record was caused by his disability and failed to evaluate his present medical condition." Pet. App. 5a. The court of appeals explained that "[t]he jury heard evidence and received instructions on [petitioner's] theory of his case," *ibid.*, which consisted of his claim that his prior poor work performance and other difficulties were the result of his disability. The jury, however, rejected petitioner's theory. As the court of appeals noted, the jury found that "[petitioner] was not qualified for the position or that the Postal Service's hiring decision was not related to his disability." *Ibid.*[*] There was no basis to overturn that finding.

---

[*] It is true that the court of appeals stated, at the end of its opinion, that it "decline[d] to address [petitioner's] claims that the Postal Service failed to meet its affirmative burdens because the issue was raised for the first time on appeal." Pet. App. 6a. In our

3. Petitioner claims (Pet. 17-21) that the decision of the court of appeals conflicts with the Second Circuit's decision in *Teahan* v. *Metro-North Commuter R.R.*, 951 F.2d 511, 517 (1991), cert. denied, 506 U.S. 815 (1992). Petitioner contends that the circuits are divided concerning the standard governing an employer's response to behavior that is a manifestation of a disability.

a. As petitioner points out, the majority of courts have held that an employer may discharge an employee for misconduct, irrespective of whether that misconduct was caused by a disability. See, *e.g.*, *Williams* v. *Widnall*, 79 F.3d 1003, 1006-1007 (10th Cir. 1996); *Newland* v. *Dalton*, 81 F.3d 904, 906 (9th Cir. 1996); *Maddox* v. *University of Tennessee*, 62 F.3d 843, 848 (6th Cir. 1995). Petitioner contends, however, that the Second Circuit adopted a somewhat different approach in *Teahan*, holding that adverse action taken in response to an employee's misconduct that is a manifestation of a disabling condition constitutes discrimination on the basis of disability.

At least one court has suggested that *Teahan* need not be read as broadly as petitioner reads it. In *Crandall* v. *Paralyzed Veterans of America*, 146 F.3d 894, 897 (D.C. Cir. 1998), the court of appeals expressed doubt as to whether *Teahan* "can be read to endorse the general proposition that if a disability causes poor job performance, and if the poor performance causes

---

view, the court did address the issue that petitioner raises in his petition, and we cannot determine what issue the court of appeals was declining to address. In any event, if there were any issue that the court of appeals failed to address, review by this Court would not be warranted to consider whether the court of appeals correctly determined—in an unpublished opinion—that petitioner had failed to present a particular issue in the district court.

dismissal, then the dismissal was 'by reason of' the disability." Rather, the court held, "[i]t seems more probable that the court intended merely to be sure that employers could not get off the hook by showing that they bore no discriminatory animus against the disability itself, independently of their attitude toward its manifestations." *Ibid.* Until the Second Circuit clarifies its position, it cannot be concluded that there is a conflict in the circuits on this point.

b. In any event, this case does not present an occasion to address the question whether adverse action taken in response to an employee's misconduct that is manifestation of a disability constitutes discrimination on the basis of the disability. The district court instructed the jury that petitioner had to prove that "[t]he fact that he had exhibited conduct that was a product of a disability was a motivating factor in the Postal Service's decision not to reemploy him." Pet. C.A. Br. App. 441. That instruction closely resembles the rule that petitioner asserts was adopted in *Teahan*: that an employer discriminates against a disabled person when the employer takes adverse action that is motivated by conduct that is a manifestation of the employee's disability. Because the jury resolved the factual disputes in this case on the basis of instructions that embodied essentially the legal rule that petitioner now states he desires, this case does not present the question whether that rule is correct.

4. Finally, petitioner contends (Pet. 22) that the decision of the court of appeals is "inconsistent with the rulings of this Court regarding the affirmative duties of a federal government employer to reasonably accommodate a handicapped person under the Rehabilitation Act." There is, however, no disagreement among the parties in this case regarding whether the federal

government has an obligation to provide reasonable accommodations to a disabled person. Indeed, the instructions informed the jury of the Postal Service's obligations in this regard. The jury was instructed that "qualified individual with a disability" means "an individual with a disability who nevertheless can perform the essential functions of the employment position he holds or desires, *with or without a reasonable accommodation*, and who meets experience and education requirements of the position." Pet App. 14a (emphasis added). The same instruction went on to state that a Postal Service regulation declaring an employee to be ineligible for reinstatement if he or she has been fired for cause "does not override the Postal Service's obligation under the Rehabilitation Act to give individualized consideration to an applicant for reinstatement by an otherwise qualified individual." *Ibid.*

The jury therefore was well aware of its task: to determine whether petitioner could perform the functions of the job with reasonable accommodation, and to determine whether the Postal Service gave proper consideration to his application for reemployment. The jury simply reached a decision with which petitioner disagrees. As the court of appeals held, there is no basis to overturn the jury's verdict in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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